No. 86044

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

v.

JOHN TALLY,

Appellant.

Appeal from the Circuit Court of Dallas County, Missouri
30th Judicial Circuit
The Honorable Theodore B. Scott, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from a conviction of production of a controlled substance (marijuana), § 195.211, RSMo 2000, obtained in the Circuit Court of Dallas County, the Honorable Theodore B. Scott presiding. For that offense, appellant was sentenced, as a persistent offender, to serve fifteen years in the Missouri Department of Corrections. The Court of Appeals, Southern District, reversed appellant's conviction and remanded the case for a new trial. Pursuant to Supreme Court Rule 83.04, this Court granted respondent's application for transfer. This Court has jurisdiction. Article V, § 10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, John Tally, was charged by information, as a persistent offender, with production of a controlled substance (more than 5 grams of marijuana), § 195.211, RSMo 2000 (L.F. 12). After a trial by jury, appellant was found guilty and sentenced to serve a term of fifteen years in the Missouri Department of Corrections (L.F. 34, 39; Tr. 225, 234). Appellant does not contest the sufficiency of the evidence to support his conviction. Viewed in the light most favorable to the verdict, the facts were as follows:

On September 2, 2002, Rick Hamilton, Eugene Wood, and Alva Thurman were engaged in marijuana eradication efforts in Webster County (Tr. 101, 148, 166-167). Wood and Thurman were in a helicopter, attempting to spot marijuana patches from the air while Hamilton traveled in his patrol vehicle below (Tr. 102). Based upon a tip they had received, they traveled to Joe Horman's home, which was located at 592 Strout Hollow, in Marshfield (Tr. 102, 119, 129). In a field behind the house, the officers in the helicopter spotted two marijuana patches; they radioed this information to Hamilton (Tr. 102, 149).

Hamilton drove into the driveway and contacted Horman (Tr. 102, 133, 149). He told Horman what they were doing, and Horman gave Hamilton permission to go behind the house and into the field (Tr. 102, 135). At about that point, the officers in the helicopter informed Hamilton that they had seen someone in the field behind the house (Tr. 103, 168).

Hamilton went behind the house and saw appellant walking toward the back of the house (Tr. 108). Concerned for his safety, Hamilton told appellant to get down on his knees and put his hands in the air (Tr. 103-105). Hamilton visually checked for weapons, saw nothing, and

told appellant that he could stand up (Tr. 105). Appellant then approached Hamilton, and Hamilton told appellant what they were doing (Tr. 105).

Hamilton told appellant that they had seen two marijuana patches in the field, and appellant said "Well, they're – those are not mine" (Tr. 106). Hamilton then asked, "Sir, do you know what a box camera is?" (Tr. 106). Hamilton explained that a box camera "kicks on" when "somebody walks up to take care of their marijuana plants . . . and then we know who's been cultivating and taking care of the plants" (Tr. 106-107). This statement was a ruse designed to elicit a response showing guilt or innocence; there was no box camera in the field (Tr. 16, 106-108).

At that point, appellant said, "Ok . . . Yeah, I've got some plants out there" (Tr. 107). Appellant then said, "What's the big deal? . . . They're only – only about that tall" (Tr. 107, 152). Appellant demonstrated the height of the plants with his hand (Tr. 152). Appellant further explained that the marijuana was "just for my personal use" (Tr. 107, 152).

After appellant was arrested, the officers returned to the marijuana patches, pulled up the plants, seized some samples, and destroyed the remaining plants (Tr. 109, 153-514, 171). The plants had been well tended (Tr. 115, 155, 172). Testing revealed that the seized plants were marijuana (Tr. 187-188). The seized samples weighed 386.76 grams (Tr. 187-188).

At trial, appellant denied any involvement with or knowledge of the plants (Tr. 194, 196-197). Appellant was found guilty and sentenced to serve a term of fifteen years in the Missouri Department of Corrections (L.F. 34, 39; Tr. 225, 234).

On direct appeal, the Court of Appeals, Southern District reversed and remanded for a

new trial, holding that appellant's incriminating statements had been obtained in violation of *Miranda*. *State v*. *Tally*, No. 25710, slip op. at 1 (Mo.App. S.D. April 29, 2004). The Court held that appellant was "in custody" when questioned, and that, accordingly, appellant should have been advised of the *Miranda* warnings. *Id*. at 11-12.

On August 24, 2004, this Court granted respondent's application for transfer.

ARGUMENT

I.

The trial court did not abuse its discretion in admitting appellant's unwarned incriminating statements, because appellant was not "in custody" for purposes of *Miranda*, in that the statements were obtained during a valid *Terry* stop that did not curtail appellant's freedom to the "degree associated with formal arrest."

Appellant contends that the trial court erred in overruling his motion to suppress and in admitting his incriminating statements into evidence (App.Sub.Br. 11). As set forth in the Statement of Facts, above, appellant was briefly detained in a field and questioned about some marijuana plants that had been observed in that vicinity. In response, appellant admitted that the marijuana plants were for his personal use.

Appellant argues that his statements were obtained in violation of his Fifth Amendment right to be free from compelled self-incrimination (App.Sub.Br. 11). More specifically, he argues that, because a reasonable person would not have felt "at liberty to terminate the interrogation and leave," he was "in custody" for purposes of *Miranda* and should have been advised of the *Miranda* warnings prior to questioning (App.Sub.Br. 15-23).

A. The Standard of Review

In reviewing the trial court's ruling on a motion to suppress, the Court defers to the trial court's determination of credibility and factual findings, inquiring only whether the decision is supported by substantial evidence. *State v. Goff*, 129 S.W.3d 857, 862 (Mo. banc 2004). The facts and reasonable inferences from such facts are considered favorably to the trial court's

ruling and contrary evidence and inferences are disregarded. *State v. Galazin*, 58 S.W.3d 500, 507 (Mo. banc 2001). Such findings will only be reversed if they are clearly erroneous. *State v. Goff*, 129 S.W.3d at 862. Questions of law, however, are reviewed *de novo*. *See id.*; *State v. Rousan*, 961 S.W.2d 831, 845 (Mo. banc 1998).

B. *Miranda* Was Not Intended to Hamper Legitimate Investigatory Practices

In deciding *Miranda*, the United States Supreme Court stated that its decision was "not intended to hamper the traditional function of police officers in investigating crime." *Miranda v. Arizona*, 384 U.S. 436, 477 (1966). As examples of investigatory practices that were not affected by the *Miranda* decision, the court explained that officers could "seek out evidence in the field to be used at trial against" a person held in custody, question "persons not under restraint,"[1] and engage in "[g]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process." *Id*.

The Court went on to state that it was "not unmindful of the burdens which law enforcement officials must bear, often under trying circumstances." *Id*. at 481. The Court pointed out that it had "always given ample latitude to law enforcement agencies in the legitimate exercise of their duties." *Id*. And, to that end, the Court also stated that "[t]he limits we have placed on the interrogation process should not constitute an undue interference with a proper system of law enforcement." *Id*.

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[1] The Court had not yet decided *Terry v. Ohio*, 392 U.S. 1 (1968), which introduced the concept of *Terry* stops – limited, investigatory detentions based upon reasonable suspicion.

In later cases, the Court has adhered to these basic principles. As an example of the Court's limiting the application of *Miranda* in the face of legitimate law enforcement efforts, the Court in *New York v. Quarles*, 467 U.S. 649 (1984), crafted a public-safety exception to the rule of *Miranda*. Specifically, when confronted with a situation in which officers had questioned an arrested suspect about the whereabouts of a gun, the Court concluded that "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." *Id*. at 657. The Court further observed that "[i]n such a situation, if the police are required to recite the familiar *Miranda* warnings before asking the whereabouts of the gun, suspects in [the defendant's] position might well be deterred from responding," to the detriment of the public. *Id*.

Other legitimate investigatory practices also have not triggered the application of *Miranda*. *See e.g. Illinois v. Perkins*, 496 U.S. 292, 300 (1990) ("We hold that an undercover law enforcement officer posing as a fellow inmate need not give *Miranda* warnings to an incarcerated suspect before asking questions that may elicit an incriminating response."); *Oregon v. Mathiason*, 429 U.S. 492, 495-496 (1977) (officer's falsely telling suspect that suspect's fingerprints had been found at crime scene did not render station house interview "custodial" under *Miranda*); *Frazier v. Cupp*, 394 U.S. 731, 739 (1969).

In yet another case, *Berkemer v. McCarty*, 468 U.S. 420 (1984), the Court examined whether an officer had to give the *Miranda* warnings prior to questioning during a traffic stop. The Court analogized such stops to *Terry* stops and acknowledged that such stops are

"seizures" within the meaning of the Fourth Amendment. *Id*. at 436-437. Nevertheless, while acknowledging that such seizures significantly curtail a person's "freedom of action," the Court held that the *Miranda* warnings were not required. *Id*. at 440. The Court reached this conclusion by pointing out some differences between a traffic stop and a station house interrogation, and by pointing out that traffic stops were analogous to investigatory *Terry* stops. *Id*. at 437-439. In short, because such stops were investigatory in nature, and necessarily limited by the circumstances, the Court concluded that such stops (absent other pressures that sufficiently impaired a person's ability to exercise his rights) were not subject to the dictates of *Miranda*. *Id*. at 437-440.

And, indeed, it makes sense that a line of reasonable investigatory questions during a *Terry* Stop does not have to be preceded by the *Miranda* warnings. During a *Terry* stop, an officer does not have probable cause to arrest the person being questioned; thus, if the officer must give the *Miranda* warnings, the suspect might be deterred from responding, and the officer, who has reasonable suspicion, is then deprived of a viable investigatory function. The suspect cannot be held based on the invocation of the rights (and the person certainly cannot be held, for example, until an attorney can be obtained). Consequently, a legitimate investigatory opportunity might be lost, even though none of the "concerns that powered the [*Miranda*] decision are implicated." *See id*. at 437.

Accordingly, where an officer makes a lawful *Terry* stop, and where the officer engages in a reasonable investigation pursuant to the *Terry* stop, a suspect is not "in custody" for purposes of *Miranda*, and the officer need not give the *Miranda* warnings prior to questioning.

C. Because Appellant Was Detained Pursuant to an Investigatory *Terry* Stop, Appellant Was Not "in Custody" For Purposes of *Miranda*

At the suppression hearing, defense counsel argued that appellant was in custody when questioned, and that, consequently, he should have been given the *Miranda* warnings prior to any interrogation (Tr. 40-42). In response, the prosecutor argued that the officer engaged in a "*Terry* stop," and that the preliminary investigatory questions prior to arrest did not constitute custodial interrogation as contemplated by *Miranda* (Tr. 42-43). After brief argument, the court overruled the motion to suppress (Tr. 45).

The question posed in this case, therefore, is whether the valid *Terry* stop – the seizure of appellant's person – evolved into a custodial setting that required the administration of the *Miranda* warnings prior to the questioning of appellant. *See Berkemer v. McCarty*, 468 U.S. at 437. A *Terry* stop will become custodial when the circumstances of the stop "exert[] upon a detained person pressures that sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights." *See id*. But that did not occur in the case at bar.

1. Factual background

On September 2, 2002, Rick Hamilton, Eugene Wood, and Alva Thurman were engaged in marijuana eradication efforts in Webster County (Tr. 4-5, 101, 148, 166-167). Wood and Thurman were in a helicopter, attempting to spot marijuana patches from the air while Hamilton traveled in his patrol vehicle below (Tr. 5, 102). Based upon a tip they had received, they traveled to Joe Horman's home, which was located at 592 Strout Hollow, in Marshfield

(Tr. 5, 102, 119, 129).

After a couple of overflights, the officers in the helicopter spotted two marijuana patches in a field behind the residence; they radioed this information to Hamilton (Tr. 5-6, 102, 149, 168, 174). From the air, it was "obvious" that the marijuana had been cultivated – a fact usually evidenced by the "pattern" of the plants, which, when planted by a "grower" will look "almost like a garden . . . that is not just there accidentally (Tr. 166, 177).

After receiving the information about the marijuana patches, Hamilton drove to the residence and contacted Joe Horman, the owner of the property (Tr. 5-6, 102, 133, 149). Hamilton told Horman what they were doing, and Horman – who denied any knowledge of the plants during brief questioning – gave Hamilton permission to go behind the house and into the field (Tr. 6, 102, 135).

At about that point, after another flight over the field, the officers in the helicopter "observed a white male subject [appellant] in the field, in the general proximity of where [they] had spotted some marijuana plants" (Tr. 19-20). Appellant's sudden appearance in the field "alarm[ed]" or "surprised" the officers because they had not seen him during their previous flights over the field (Tr. 150).

The officers in the helicopter informed Hamilton that they had "observed a person walking away from one of the areas where one of the . . . marijuana patches was located" (Tr. 6, 103). The officers in the helicopter then gestured for appellant to move toward Hamilton, and appellant complied (Tr. 20, 32). The helicopter remained where it was in the air while appellant walked toward Hamilton (Tr. 177).

Hamilton went behind the house and saw appellant walking toward the back of the house (Tr. 6, 108). Hamilton was unarmed, and, concerned for his safety, he told appellant to get down on his knees and put his hands in the air (Tr. 6-7, 103-105). From several yards away, Hamilton visually checked for weapons, saw nothing, and told appellant that he could stand up (Tr. 7, 105). Appellant was on the ground for less than a minute (Tr. 7). Appellant then approached Hamilton, and Hamilton told appellant what they were doing (Tr. 7, 105).

Hamilton said they had seen two marijuana patches in the field, and appellant said that he was out in the field "looking for rocks," and that the plants were not his (Tr. 7, 106). Appellant asked if he was "under arrest," and Hamilton said, "Not at this time" (Tr. 8).

Hamilton then asked appellant, "Sir, do you know what a box camera is?" (Tr. 8, 106). Hamilton explained that a box camera "kicks on" when "somebody walks up to take care of their marijuana plants . . . and then we know who's been cultivating and taking care of the plants" (Tr. 8, 106-107). This statement was a ruse designed to elicit a response showing guilt or innocence; there was no box camera in the field (Tr. 16, 106-108).[2]

At that point, appellant said, "Ok . . . Yeah, I've got some plants out there" (Tr. 107). Appellant then said, "What's the big deal? . . . They're only – only about that tall" (Tr. 8, 107, 152). Appellant demonstrated the height of the plants with his hand (Tr. 152). Appellant further

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[2] Hamilton had used this same interrogation technique on Horman when he first arrived at Horman's residence (Tr. 12). Horman denied any knowledge of the plants and gave Hamilton permission to enter his property (Tr. 6).

explained that the marijuana was "just for my personal use" (Tr. 107, 152). Appellant was then placed under arrest by Officer Wood, who had, while Officer Hamilton made contact with appellant, exited the helicopter and joined them on the ground (Tr. 20-22, 108, 152).[3] The entire encounter took place in a matter of minutes (Tr. 17, 140, 171).

2. The seizure of appellant's person during a valid *Terry* stop did not curtail appellant's freedom to the "degree associated with formal arrest"

In *Terry v. Ohio*, the United States Supreme Court recognized "that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Terry v. Ohio*, 392 U.S. 1, 22 (1968). An officer may also briefly detain and search such individuals if there are "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id*. at 21.

However, the stop and inquiry must be reasonably related in scope to the justification for their initiation. *Berkemer v. McCarty*, 468 U.S. at 439. "Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to

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[3] Appellant asserts that Officer Wood testified that appellant was on his knees when he admitted that the marijuana plants were his; however, Officer Wood's testimony was not entirely uniform in that regard. At the suppression hearing, Officer Wood testified that he believed appellant "had stood up at that time and was discussing . . . the information . . . with [Officer] Hamilton" (Tr. 22).

try to obtain information confirming or dispelling the officer's suspicions." *Id*. In such circumstances, unless "a suspect's freedom of action is curtailed to a 'degree associated with formal arrest,'" the suspect is "not 'in custody' for the purposes of *Miranda*." *Id*. at 440. As the Court observed, "[t]he comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda*." *Id*. In other words, while a person is certainly detained during a *Terry* stop – a stop "significantly curtails" a person's "freedom of action" – such stops do not necessarily implicate "the concerns that powered the [*Miranda*] decision." *Id*. at 436-437 ("Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated.").

In the case at bar, the initial seizure of appellant's person was a valid *Terry* stop.[4] As outlined above, just prior to the seizure, which occurred at or near the scene of the crime, the officers observed cultivated marijuana plants in a field; however, they did not immediately see appellant (Tr. 5-6, 19-20, 102, 149-150, 168, 174, 177). Then, as the helicopter passed over the field again, appellant was spotted in the field, "walking away from one of the areas where one of the . . . marijuana patches was located" (Tr. 6, 103). These facts, when viewed in context, gave rise to a reasonable suspicion that appellant was engaged in criminal activity.

It was apparent from the officers' personal observations that the crime of marijuana production was being committed in the field where appellant was first seen. The officers saw

[4] Appellant does not allege any Fourth Amendment violation.

the plants in the field, and, to the trained eye of the helicopter pilot, the marijuana patches were "obvious[ly]" cultivated (Tr. 166, 177). *See State v. Spurgeon*, 907 S.W.2d 798, 800 (Mo.App. S.D. 1995) ("The retrospective evaluation takes into consideration the inferences which would be drawn by a trained police officer and the evidence is to be viewed as seen by one versed in law enforcement."). Appellant's presence in the field, in the vicinity of the marijuana patches, made it possible that he was person cultivating the plants – i.e., he had the opportunity to commit the crime. Additionally, appellant's sudden appearance in the field after the initial overflights suggested that he may have been hiding when the helicopter first passed by – a fact showing consciousness of guilt and suggesting his involvement in the crime.[5] Finally, prior to appellant's sudden appearance in the field, the officers had completed some initial investigation and had, at least to some degree, eliminated the owner of the property as the wrongdoer (Tr. 6, 102, 135). Taken together, these facts, and reasonable inferences from them, gave rise to a reasonable suspicion that appellant was involved in the criminal activity that was observed at the scene. *See Terry v. Ohio*, 392 U.S. at 21-22 (in assessing the reasonableness of the stop the facts must be judged against an objective standard, i.e., whether the facts

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[5] Notably, "[t]he circumstances leading to an authorized *Terry* stop do not have to exclude the possibility of innocent behavior." *State v. Spurgeon*, 907 S.W.2d at 800; *see Terry v. Ohio*, 392 U.S. at 22-23 (describing how "a series of acts, each of them perhaps innocent in itself," can nevertheless produce reasonable suspicion and warrant further investigation).

available to the officer at the moment of the seizure warrant a man of reasonable caution in the belief that the action taken was appropriate).

Accordingly, when the officers briefly[6] seized appellant by directing him toward the house and telling him to get down on his knees and put his hands in the air, there were specific and articulable facts to support the officers' suspicion that appellant was involved in criminal activity. And, inasmuch as it is common for drug manufacturers and distributors to carry weapons, *see generally State v. Shannon*, 835 S.W.2d 406, 408 (Mo.App. W.D. 1992) ("The sale of drugs often involves armed violence."),[7] Officer Hamilton's actions in temporarily immobilizing appellant (without physical restraints) and conducting a minimally intrusive visual search of appellant's person for weapons, was likewise warranted and reasonably tailored to match the circumstances.[8]

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[6] In light of the trial court's ruling, it is apparent that the trial court credited the testimony of Officer Hamilton, the seizing officer, who stated that appellant was only on the ground for a brief period prior to questioning. Contrary testimony should be disregarded.

[7] *See Terry v. Ohio*, 392 U.S. at 23-24 ("American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded. Virtually all of these deaths and a substantial portion of the injuries are inflicted with guns and knives.").

[8] As with the seizure of his person, appellant does not contest the propriety of the visual "search" of his person that Hamilton conducted during the *Terry* stop. However, given the minimal intrusiveness of such a search, the intrusion was reasonable and warranted under the

In short, while appellant was certainly detained by the officers, the detention was supported by reasonable suspicion, and it was of very brief duration. More importantly, however, it is apparent that the brief detention in this case did not curtail appellant's freedom to the degree associated with formal arrest. Thus, when appellant was briefly questioned, it was not necessary for Officer Hamilton to first advise appellant of the *Miranda* warnings.

In arguing to the contrary, appellant focuses on his assertion that a reasonable person would not have felt "at liberty to terminate the interrogation and leave" (App.Sub.Br. 15-23). But, while appellant cites to *Berkemer v. McCarty* (App.Sub.Br. 15, 21-22), appellant's argument entirely overlooks the fact that the "freedom-to-leave" analysis provides no meaningful guidance for determining whether a *Terry* stop has evolved into "custody" for purposes of *Miranda*.

This is because, by definition, a *Terry* stop is a "seizure" and person is not free to simply walk away at will. *See Berkemer v. McCarty*, 468 U.S. at 436-437 ("It must be acknowledged at the outset that a traffic stop significantly curtails the 'freedom of action' of the driver and the passengers, if any, of the detained vehicle."); *Terry v. Ohio*, 392 U.S. at 16 ("It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."). In other words, if *Miranda*'s ordinary "in custody" evaluation were strictly applied to *Terry* stops, then every *Terry* stop would be subject to the dictates of *Miranda*. *See United States v. Acosta*, 363 F.3d 1141, 1148 (11th

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circumstances. Of course, the visual search yielded nothing of evidentiary value in any event.

Cir. 2004) ("If we applied the general *Miranda* custodial test literally to *Terry* stops, the result would be that *Miranda* warnings are required before any questioning could occur during any *Terry* stop.").

However, as is evident, *Berkemer v. McCarty* established that some detentions – even when the person is not free to leave – are not the equivalent of "formal arrest" or "custody" as contemplated by *Miranda*. Indeed, in examining the differences between "the types of situations . . . that powered the [*Miranda*] decision," and traffic stops (which it analogized to *Terry* stops), the Court identified two main distinguishing factors.

First, the Court recognized that such stops are "presumptively temporary and brief." *Berkemer v. McCarty*, 468 U.S. at 437. Accordingly, the Court distinguished traffic stops, which ordinarily "last only a few minutes," from a "station house interrogation, which frequently is prolonged, and in which the detainee often is aware that questioning will continue until he provides his interrogators the answers they seek." *Id*. at 437-438. The Court noted:

> The brevity and spontaneity of an ordinary traffic stop also reduces the danger that the driver through subterfuge will be **made** to incriminate himself. One of the investigative techniques that Miranda was designed to guard against was the use by police of various kinds of trickery–such as "Mutt and Jeff" routines–to elicit confessions from suspects. A police officer who stops a suspect on the highway has little chance to develop or implement a plan of this sort.

Id. at 438 n. 27 (internal citations omitted; emphasis added).

Second, the Court recognized that, during a traffic or *Terry* stop, most detainees would

not "feel[ ] completely at the mercy of the police." *Id*. at 438. The Court recognized that the inherent authority of armed police officers "exert[s] some pressure on the detainee to respond to questions," but the Court concluded that this inherent authority was more than offset by other aspects of such stops:

> Passersby, on foot or in other cars, witness the interaction of officer and motorist. This exposure to public view both reduces the ability of an unscrupulous policeman to use **illegitimate** means to elicit self-incriminating statements and diminishes the motorist's fear that, if he does not cooperate, he will be subjected to abuse. The fact that the detained motorist typically is confronted by only one or at most two policemen further mutes his sense of vulnerability. In short, the atmosphere surrounding an ordinary traffic stop is substantially less "police dominated" than that surrounding the kinds of interrogation at issue in *Miranda* itself, and in the subsequent cases in which we have applied *Miranda*.

Id. at 438-439 (internal citation omitted; emphasis added).

In the case at bar, both of these factors, operated to remove the concerns that originally gave rise to the *Miranda* decision. As set forth above, appellant's detention was very brief, lasting a matter of minutes; appellant was only temporarily asked to kneel, and he was not handcuffed or otherwise physically restrained during the stop; appellant was not, through coercive tactics, made to incriminate himself; appellant was questioned in an open field, with the owner of the field (another citizen) standing a short distance away; appellant was only

questioned by one officer (the other two were landing in the helicopter a short distance away); and appellant was specifically told that he was not under arrest at the time he was questioned.

In short, while appellant was certainly detained, he was not "in custody" for purposes of *Miranda*. As set forth above, a single officer asked appellant to kneel briefly, told appellant that he was not under arrest, and then asked appellant a modest number of questions (approximately three), in the presence of another citizen who was watching from a short distance away. Such questioning was well within the scope of the stop, and it did not "exert[] upon [appellant] pressures that sufficiently impair[ed] his free exercise of his privilege against self-incrimination." Appellant simply was not subjected to the equivalent of a formal arrest. *See Berkemer v. McCarty*, 468 U.S. at 442 ("From aught that appears in the stipulation of facts, a single police officer asked respondent a modest number of questions and requested him to perform a simple balancing test at a location visible to passing motorists. Treatment of this sort cannot fairly be characterized as the functional equivalent of formal arrest."); *United States v. Acosta*, 363 F.3d at 1150 (the defendant was stopped in a public place, was not questioned at gunpoint (because the officers quickly holstered their weapons), was allowed to stand the entire time, was not physically restrained in any way, and was told that he was not under arrest); *compare United States v. Perdue*, 8 F.3d 1455, 1464-1466 (10th Cir. 1993) (defendant and his fiancee were stopped in an isolated, rural area; the defendant was ordered to the ground, and the officers kept their guns drawn on him and his fiancee; the defendant was questioned while lying face down; the officers may have used physical force and handcuffs; and police helicopters circled overhead during the encounter).

D. The Ruse Question was a Legitimate Investigatory Question

Finally, in arguing that he was "in custody" appellant points to the fact that Officer Hamilton used a ruse question to obtain appellant's initial admission of guilt (App.Sub.Br. 19). The Court in *Berkemer* mentioned "subterfuge" and "trickery" as having some relation to the question of "custody;" however, it is evident that the salient consideration is whether such subterfuge or trickery is a coercive or *illegitimate* means of obtaining information – i.e., whether through such subterfuge or trickery a person "will be **made** to incriminate himself." *Berkemer v. McCarty*, 468 U.S. at 438 n. 27 (emphasis added); *see Beckwith v. United States*, 425 U.S. 341, 346-347 (1976) ("'It was the compulsive aspect of custodial interrogation, and not the strength or content of the government's suspicions at the time the questioning was conducted, which led the Court to impose the *Miranda* requirements with regard to custodial questioning) (quoting *United States v. Caiello*, 420 F.2d 471, 473 (2nd Cir. 1969)).

Thus, if an officer asks a merely untrue question or uses a ruse to obtain information, a *Terry* stop does not evolve into "custody" for purposes of *Miranda*. Indeed, if properly employed, deceptive questions and subterfuge are important and legitimate law enforcement tools. *See Illinois v. Perkins*, 496 U.S. at 300; *Oregon v. Mathiason*, 429 U.S. at 495-496; *Frazier v. Cupp*, 394 U.S. at 739.

In fact, in most instances, regardless of whether the question posits a true or false fact, the considerations outlined in *Berkemer v. McCarty* – and not the subjective knowledge of the officer – should govern whether a *Terry* stop (and the attendant questioning) exerts the types of pressures that *Miranda* was designed to combat. *See Berkemer v. McCarty*, 468 U.S. at 442

("A policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation."); *see also Kolender v. Lawson*, 461 U.S. 352, 366 (1983) (during a *Terry* stop, officers "may ask their questions in a way calculated to obtain an answer[, b]ut they may not compel an answer, and they must allow the person to leave after a reasonably brief period of time unless the information they have acquired during the encounter has given them probable cause sufficient to justify an arrest") (Brennan, J., concurring).

To hold otherwise would unduly limit a legitimate investigatory tool, and needlessly expand *Miranda*'s exclusionary rule. In the case at bar, for example, the officer engaged in a valid *Terry* stop that was based upon reasonable suspicion. Then, after a minimally intrusive visual search for weapons, the officer told appellant that he was not under arrest and asked approximately three questions. The interaction between the investigating officer and appellant was extremely brief and designed to uncover pertinent information without unnecessary delay. Such minimally intrusive actions and brief questions fit well within the permissible bounds of a *Terry* stop, and officers who act within such bounds should not be penalized for their careful efforts. *See generally Terry v. Ohio*, 392 U.S. at 13 ("[The exclusionary rule] cannot properly be invoked to exclude the products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections.").

In short, seeking to curtail the use of deceptive questions (in the absence of coercion)

does not further the primary interest of *Miranda*. As outlined above, while *Miranda* was primarily concerned with preventing practices that compelled testimony, it was also concerned with promoting and protecting legitimate investigatory techniques. *See Miranda v. Arizona*, 384 U.S. at 477-481; *see also United States v. Klein*, 13 F.3d 1182, 1184 (8th Cir. 1994). Consequently, any rule requiring *Miranda* warnings should focus upon the coercive aspects of police conduct and leave legitimate law enforcement tools intact. To do otherwise unduly curtails legitimate law enforcement methods and deprives society of its "compelling interest in finding, convicting, and punishing those who violate the law." *See generally Moran v. Burbine*, 475 U.S. 412, 425-426 (1986).

Accordingly, this Court should attach no significance to the fact that Officer Hamilton misled appellant as to whether there actually was a "box camera" in the field.

E. Conclusion

In sum, prior to his formal arrest, appellant was merely subjected to a very brief *Terry* stop and limited, investigatory questioning that was not in any way coercive. The officer's conduct was minimally intrusive and reasonably tailored to the circumstances, and appellant was not subjected to arrest-like constraints during the stop. Accordingly, while appellant was certainly "seized" during the *Terry* stop and unable to leave, appellant was not restrained to the degree associated with "formal arrest." In short, he was not "in custody" for purposes of *Miranda*. This point should be denied.

CONCLUSION

In view of the foregoing, respondent submits that appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

(1) That the attached brief complies with the limitations contained in this Supreme Court Rule 84.06(b), and that the brief, excluding the cover, the certificate of service, this certificate, the signature block, and appendix, contains 6,038 words (as determined by WordPerfect 9 software);

(2) That the floppy disk filed with this brief, and containing a copy of this brief, has been scanned for viruses and is virus-free; and

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